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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-128

ADOLPH COORS COMPANY,
Petitioner

vs.

FEDERAL TRADE COMMISSION,
AN AGENCY OF THE FEDERAL GOVERNMENT,
Respondent.

BRIEF AMICUS CURIAE OF NORTH AMERICAN PHILIPS CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS

North American Philips Corporation is a Delaware corporation which manufactures and sells a wide range of highly sophisticated and technical products throughout the United States and the world under a variety of marketing arrangements. The experience gained over many years of business leads North American Philips to urge that the public interest requires the granting of the present Petition for Writ of Certiorari as to the issues raised in the first question presented in the petition.

North American Philips, as a matter of full disclosure, states that it is a party to a lawsuit pending in the United States District Court for the Western District of Pennsylvania involving a challenge to certain alleged marketing practices of one of its operating subsidiaries. While experience gained in that litigation may have influenced the thinking of responsible corporate officials, none of the specific facts, products or alleged marketing arrangements involved in that lawsuit will be discussed in this brief. Rather, this brief will address itself to the public interest in obtaining a clarification of the law relating to the issue of whether under certain circumstances restrictions may properly be imposed by a manufacturer upon an independent distributor of products.

North American Philips Corporation files this brief in support of the Petition for Writ of Certiorari with the consent of both parties to this litigation pursuant to Rule 42 (1) of this Honorable Court.

ARGUMENT

I. The inherent nature of certain products or the reasonable requirements of consumers require that restrictions be imposed in the marketing of products.

The opinion of this Court in *United States v. Arnold Schwinn & Co.*, 388 U. S. 365 (1967), involved the marketing of bicycles which are purchased and used oftentimes by even the youngest members of most households. A large percentage of the articles sold in commerce in this country are similarly intended for the everyday use of consumers in their businesses and households. There is a strong public interest in making normal everyday products freely and fully available to the public without restriction on individual choices respecting price, quality and service in purchasing them. This is particularly true where the only justification urged for the imposition of restraints on the independent distributor of such products is the promotion of the self-interest of the manufacturer of such goods. This Court has recently emphasized by quoting from the *Schwinn* opinion that such economic self-interest "does not invoke the rule of reason to immunize otherwise illegal conduct." *Otter Tail Power Co. v. United States*, 410 U. S. 366 at 380 (1973).

Not every product sold in commerce is simple and uncomplicated. Moreover, many articles are introduced into the channels of commerce which are or may be dangerous unless they are properly used or unless they are properly maintained and repaired. The amicus will point to two separate product lines which it manufactures as examples to illustrate the need for controlled distribution in the public interest.

Through one of its divisions, North American Philips Corporation markets a line of medical X-ray equipment. This is an industry where obvious controls must be imposed upon

the sale of goods. It is clear, for example, that a manufacturer of X-ray equipment can and must require that its own sales personnel or its distributors will sell such equipment only to physicians, hospitals or similar institutions where the equipment will be operated safely in a properly prepared facility. Moving one step away from hazardous X-ray equipment, the United States Court of Appeals for the Third Circuit held that restrictions might properly be imposed on the resale of products used by beauticians which had the potential of causing harm if used by someone who did not understand the potential hazards of the product. *Tripoli Co., Inc. v. Wella Corporation*, 425 F.2d 932 (3rd Cir. 1970), *cert. den.*, 400 U. S. 831 (1970).

Indeed, a reading of the opinion of the United States Court of Appeals for the Tenth Circuit in the present case indicates that the members of that court were prepared to hold that the unique product characteristics of the non-pasturized beer produced by the Petitioner would have justified the territorial policy of the Petitioner had they not felt constrained by their reading of the *Schwinn* opinion to hold that any restrictions upon the resale of products by an independent distributor is *per se* illegal.

Not only is it true that there are products whose nature requires that resellers be restrained from haphazard marketing to the public, but there are also situations where the reasonable expectations of the consuming public require that some restraints be imposed upon the business operations of those who sell and service products which come into the hands of the ultimate customer. While countless examples exist, most commonly such situations exist where some continuing obligation to inspect, to install and to provide service or maintenance exists. *See, United States v. Jerrold Electronic Corp.*, 187 F. Sup. 545 (E.D. Pa. 1960), *aff'd per curiam* 365 U.S. 567 (1961).

A second example from among the many product lines produced by North American Philips will illustrate this point. Due to the rash of incidents involving terrorism, airlines have been forced to install baggage inspection equipment. North American Philips Corporation manufactures and sells baggage inspection equipment to the airlines. Such equipment may involve delicate instrumentation and electronic circuitry. Naturally, the airlines and their passengers must look to the seller of such equipment to see that it is properly installed and to insure that prompt maintenance and service is available. When baggage inspection equipment breaks down, airlines have been forced to resort to personal inspection of persons and baggage causing postponements of flights and endangering the good will of the airlines. Clearly the airlines have a right to look to the manufacturer of that equipment to provide a marketing arrangement under which service will be promptly available so as to avoid such costly and disconcerting inconvenience. One way in which this may be accomplished, if one markets through independent distributors, is to require the distributor to provide service and to have the distributor confine his activities to a geographical area which the distributor is capable of adequately covering on the shortest of notice 24 hours a day.

The public interest in obtaining prompt service was before the United States Court of Appeals for the Ninth Circuit in terms of the interest of the average American motorist in obtaining prompt service when an automobile breakdown occurs. In *Anderson v. American Automobile Association*, 454 F.2d 1240 (9th Cir. 1972), that court recognized that the policy of the Automobile Association in imposing territorial restrictions on its appointed outlets might well be justified by the public interest in seeing that the stranded motorist receives quick and efficient service.

In the present case a reading of the opinion of the circuit court of appeals indicates that it might have been

disposed to consider the interests of the public and of the producer in seeing that distributors regularly visited all retailers to assure that its merchandise had not become spoiled due to age. Again, the court appears to have felt bound by the *Schwinn* opinion to avoid any consideration as to whether a reasonable justification could exist for the territorial policy involved in this case.

It is respectfully submitted that the opinion of the lower court in this case involves a misapprehension of the proper role of *per se* rules in the enforcement of the antitrust laws. That misapprehension will have the inevitable result of casting doubt upon the validity of necessary restrictions in the types of marketing situations discussed in this section of the brief. *Per se* rules are designed to strike down practices or agreements which lack any redeeming virtue and whose sole effect is to impede competition.

If a court is satisfied that restrictions have been imposed upon a distributor with respect to everyday articles of commerce for the sole purpose of enhancing the economic self-interest of the manufacturer, there would appear to be reason to invoke a *per se* rule as was done in *Schwinn*. The approach which is implicit in the *Schwinn* opinion requires a two-step process. The court should, first, make a threshold inquiry into the reason or purpose for the restraint and should look to the product or market involved. It is only after this threshold analysis has been made that the court can determine whether a *per se* rule should or should not be invoked. If the product has unique requirements, or if the consuming public is entitled to expect follow-up conduct on the part of the distributor, it is inappropriate to invoke a *per se* rule to condemn such restraints. The proper course of conduct in such circumstances is to look to the "economic and business stuff out of which these arrangements emerge." *White Motor Company v. United States*, 372 U. S. 253 at 263 (1963). In

short, the analysis would then require the kind of judicial balancing of interests which is required under the rule of reason.

Because the opinion of the court below failed to follow the approach which appears to be required by the *Schwinn* opinion and thereby threatens to invalidate marketing arrangements which are needed in the public interest, this Court should grant review.

II. If *Schwinn* applies to all products and all markets, the alternative is to cease marketing through independent distributors.

In the preceding section of this brief, the amicus has assumed that the law ought to recognize that the inherent nature of certain products or the reasonable requirements of the consuming public justify a manufacturer in contracting for certain controls such as restrictions upon the territory or upon the class of customers to be served by an independent distributor. If the law does not permit this to occur, manufacturers will simply have to make other marketing arrangements. Dangerous or potentially dangerous products must, of necessity, continue to be marketed. Purchasers will still expect the manufacturer of those products to assure that prompt and efficient service is available.

If the *Schwinn* rule means that a manufacturer cannot contract with its independent distributors to meet those special situations where the product or the market requires more than haphazard marketing arrangements, the manufacturer will have to cease dealing with independent distributors. This dilemma confronts every company like North American Philips which manufacturers products requiring special attention. One alternative which manufacturers have adopted is to market their products through manufacturer's

representatives or sales agents who merely solicit orders for the manufacturer. This is rarely a satisfactory marketing arrangement for either the manufacturer or the customer. Thus in most cases the answer chosen by a manufacturer is to expand its business vertically and utilize its own salaried employees to sell and service its products. Many companies would prefer not to have to make this choice. Particularly in times of tight money, the capital which must be invested in retail outlets could better be used in expanding plant capacity or in product development. To the extent that independent distributors can assume the financial responsibility for their operation, the manufacturer is relieved of that burden. It is also the experience of manufacturers like North American Philips that there are many individuals and small firms who have the ability and the desire to function as independent distributors. A rigid interpretation of the *Schwinn* rule means, however, that those individuals or firms will lose that opportunity.

In a dissenting opinion in *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U. S. 293 (1949), Mr. Justice Douglas warned that the inevitable impact of that decision would be to foster vertical integration in the petroleum industry. Precisely that problem is posed by the opinion of the United States Court of Appeals for the Tenth Circuit in the present case. If the law is, as that court perceives it to be, then manufacturers of products which require special handling must abandon attempts to market through independent distributors. Vertical integration will be forced upon them and potential independent distributors will be deprived of the opportunity to engage in the business of selling and servicing those special products.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted to examine the problems raised by the first question set forth in that petition. The potential impact of the decision of the lower court on the business operations of countless manufacturers and distributors throughout the country is such that this Court should grant review.

Respectfully submitted,

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